SMI of Worcester, Inc. *and* Local 1228, International Brotherhood of Electrical Workers, AFL-CIO *and* Massachusetts Laborers' District Council, Laborers' International Union of North America, AFL-CIO

Local 411, International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, AFL-CIO *and* Massachusetts Laborers' District Council, Laborers' International Union of North America, AFL-CIO. Cases 1-CA-20298, 1-CA-20359, and 1-CB-5588

7 September 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 22 February 1984 Administrative Law Judge Bernard Ries issued the attached decision. Respondent SMI of Worcester, Inc. (SMI) filed exceptions and a supporting brief,[1] to which Massachusetts Laborers' District Council filed an answering brief. The General Counsel also filed exceptions, to which SMI filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified and to adopt the recommended Order as modified.

I.

SMI excepts to the judge's upholdings of the principal allegation in this case: that SMI violated Section 8(a)(2) by recognizing and entering into collective-bargaining agreements with Respondent Local 411, International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, AFL-CIO (IATSE) at a time when Local 411 did not represent an uncoerced majority of employees in two bargaining units of SMI's employees. SMI also excepts to the judge's holdings that SMI violated Section 8(a)(1) by interrogating an employee, by threatening to discharge employees for refusing to sign union membership applications, and by agreeing to contract clauses that unlawfully restricted employee activity. The General Counsel excepts to the judge's finding that SMI granted recognition to Local 411 at a time when SMI employed a representative complement of employees in the utility worker bargaining unit. The General Counsel also excepts to the judge's holding that SMI did not extend unlawful assistance to Local 411 by allowing a Local 411 representative to use SMI's premises. Finally, the General Counsel excepts to the judge's failure to include as part of the remedy the making whole of those unit employees who had dues deducted and remitted to Local 411. We find merit only in SMI's exception to the 8(a)(1) violation for restricting employee activity and in the General Counsel's exception concerning the remedy.

II.

SMI is engaged in management of the Centrum, a civic center in Worcester, Massachusetts. On 31 August 1982[4] SMI and Local 411 signed collective-bargaining agreements covering SMI's facility technician and facility utility worker units. Under the heading "Union Activity," both contracts contained the following provision:

> No employees shall engage in any Union activity, including the distribution of literature, which could interfere with the performance of work during his working time or in working areas at any time.

In section VII of his decision, the judge found that this provision was ambiguous and could be interpreted by employees in such a way as to cause them to refrain from exercising their statutory rights. Accordingly, he held that SMI violated Section 8(a)(1) by agreeing to this language. However, in reaching this conclusion, the judge failed to take into account evidence that this contract provision was not enforced, that the employees understood they were permitted to engage in union activities on their own time and that, in fact, they did engage in such activities.

Several factors demonstrate that the contract's union activity provision did not deter the employ-

[1] SMI has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] SMI has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In particular, although we find no basis for reversing the judge's crediting of William Roberts' initial testimony over differing testimony given by him on a later day of hearing, the judge's remark that subornation of perjury occurred during the period between the 2 hearing days is conjectural and we decline to adopt it.

[3] The judge's decision includes prominent treatment of discussions between SMI and IATSE that the judge termed to be "pre-recognition bargaining." There was no allegation of unlawful "pre-recognition bargaining" in this case, and we do not rely on the judge's extensive consideration of this subject.

[4] All dates mentioned are in 1982, unless otherwise indicated.

ees from exercising their statutory rights. To begin with, there is little indication that the employees were aware of the provision. There is no evidence that SMI disseminated the union activity provision to its employees, included the provision in an employee handbook, posted it on bulletin boards, or took any other action to make the provision known to the employees.

IATSE representatives, however, showed the facility technicians contract to some employees, who possibly could have read the union activity provision in it. Prior to being hired, employees Brophy and Heelon were shown draft copies of the facility technicians contract, which contained the union activity provision, by George Clisas, a business agent for IATSE Local 23. However, Brophy and Heelon expressed interest in the provisions concerning wages and medical benefits and there is no evidence that they looked at any portion of the contract other than those provisions at that time. Additionally, on 13 September, about 2 weeks after the contract was signed, IATSE representative Paul showed the contract to five members of the technicians unit. At that time and at a meeting later that day with SMI President Tavares, the technicians asked questions concerning the contract's provisions on wage rates, raises, medical benefits, layoffs, overtime, and holidays. There is no indication that any attention was directed to the union activity provision. Thus, there is no evidence that any unit employee was actually cognizant of the contents of the union activity provision.

Additionally, regardless of whether any employees knew of the union activity provision, SMI did not enforce it. Tavares testified without contradiction that employees were permitted to talk about union matters on their breaktime. He stated that everyone was cautioned about not interfering with their daily workload, but whatever they did on their own time was up to them. He also gave uncontroverted testimony that employees were allowed to put up posters concerning union matters and to wear clothing with union insignias. Employees frequently wore Laborers Union baseball hats and passed out paraphernalia pertaining to the Laborers Union, and no action was taken against them. Additionally, Building Superintendent Breault testified, also without contradiction, that sometime in the fall of 1982, a poster urging employees interested in the Laborers Union to contact technician Brophy appeared on the bulletin board in the engineers' office, which was the work station of some of the technicians. Breault mentioned the poster to his superiors, but it was not taken down. Brophy testified that he obtained employees' signatures on Laborers Union authorization cards during the second week of September, but since he did not detail where or what times the card solicitations occurred, his testimony on this point neither contradicts nor corroborates that of Tavares and Breault concerning employee activities permitted by SMI.

On the basis of this evidence, we find that the General Counsel did not show that the unit employees were aware of the contents of the contract's union activity provision, and it is unlikely that they refrained from engaging in protected activities because of it. However, even if they did know of this provision, they also knew that it was not enforced. Management had explained to them that what they did on their own time was up to them. Moreover, the employees knew that SMI's actual practice was to permit employees to engage in union activities on their own time, including activities on behalf of the Laborers Union. Therefore, we conclude that this case is governed by the holding of *Standard Motor Products*, 265 NLRB 482 (1982), where an employer's facially invalid no-solicitation rule was found not to violate Section 8(a)(1) when the rule was not enforced, employees were told that they could do what they wanted to do during their own time, and employees understood that union solicitation was permitted during breaks and lunchtime. Our conclusion is not altered by the judge's finding, which we adopt, that SMI's president engaged in one instance of unlawful interrogation of a unit employee concerning distribution of Laborers Union authorization cards. The contract's union activity provision was not mentioned during the interrogation, the interrogation was a single occurrence, and there were numerous instances of employee activities on behalf of the Laborers Union that occurred without incident. Thus, despite the single instance of interrogation, it is apparent that the union activity provision was not enforced and the employees were aware that union activities were allowed to the extent mandated by the Act. Accordingly, we dismiss the complaint's allegation that SMI violated Section 8(a)(1) by promulgating, administering, and enforcing a rule unlawfully restricting the rights of employees to engage in any union activity during nonworking time.[5]

[5] The judge found that Local 411 violated Sec. 8(b)(1)(A) by agreeing to the contracts' union activity provisions. In the absence of an exception by Local 411 to this finding, we adopt it pro forma. However, since we have found that the provisions did not, in fact, interfere with, restrain, or coerce SMI's employees in the exercise of their Sec. 7 rights, we will delete the portions of the Order and notice that were predicated on this violation.

Member Dennis does not agree that the above facts are sufficient to negate the judge's conclusion that the parties maintained contractual clauses unlawfully restricting employee union activity. She therefore

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III.

In providing a remedy for SMI's and Local 411's execution of collective-bargaining agreements at a time when Local 411 did not represent an uncoerced majority of employees in either unit covered by the agreements, the judge did not provide for the making whole of unit employees from whose pay dues were deducted and remitted to Local 411 under the union-security provisions of the agreements. The General Counsel excepts to this omission, and we agree with his contention. Since in neither unit did a majority of employees freely choose Local 411 as their bargaining representative, the dues required to be paid to Local 411 under the union-security clauses of the contracts must be refunded to employees who had not voluntarily become members of Local 411 prior to execution of the contracts. See *Carpenters Local 60 v. NLRB*, 365 U.S. 651 (1961); *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943). There is some indication in the record, as SMI points out, that no dues were deducted from the unit employees' pay. However, as the evidence is not sufficient to establish that no dues were withheld, we will proceed to order dues reimbursement. Doing so will place no additional obligation on Local 411 or SMI in the event that no dues were withheld. Accordingly, we will modify the judge's recommended Order so as to require SMI and Local 411 to make whole those unit employees who did not voluntarily become members of Local 411 before the execution of the contracts and who had dues deducted under their contract.

ORDER

A. Respondent SMI of Worcester, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing and bargaining with Local 411, International Alliance of Theatrical Stage Employes and Moving Picture Operators of the United States and Canada, AFL-CIO (Local 411), as the exclusive collective-bargaining representative of its facility technician employees and its facility utility workers, unless and until Local 411 has been certified by the National Labor Relations Board as the exclusive bargaining representative of any such employees in an appropriate bargaining unit.

(b) Giving effect to the 31 August and 14 September 1982 collective-bargaining agreements executed by Respondents SMI and Local 411 with respect to the facility technicians and the facility utility workers, and any modifications or current extensions thereof.

(c) Recognizing and bargaining with Local 411 or any other labor organization at a time at which such labor organization does not represent an uncoerced majority of the employees in the unit as to which recognition is extended.

(d) Coercively interrogating employees and threatening to discharge employees for refusing to execute union membership applications under a union-security clause.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from Local 411 as the representative of its facility technicians and facility utility workers, unless and until said labor organization has been certified by the National Labor Relations Board as the exclusive representative of any such employees.

(b) Jointly and severally with Local 411 reimburse SMI's past and present employees, except those who voluntarily joined Local 411 prior to 31 August 1982, for all Local 411 dues withheld from their pay pursuant to the collective-bargaining agreements executed on 31 August or 14 September 1982 by SMI and Local 411 covering facility technicians or facility utility workers, plus interest, which is to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

(c) Post at its Worcester, Massachusetts location in places where such notices are customarily posted, copies of the attached notice marked "Appendix A."[6] Copies of the notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent SMI's authorized representative, shall be posted by Respondent SMI immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

Post at the same places, and under the same conditions as in the preceding subparagraph, signed copies of Respondent Local 411's notice to employees marked "Appendix B."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent SMI has taken to comply.

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would order that both Respondents cease and desist from maintaining such clauses.

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

B. Respondent Local 411, International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Worcester, Massachusetts, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Accepting recognition from employers, and executing and giving effect to collective-bargaining agreements, at a time when Respondent Local 411 does not represent an uncoerced majority of employees in an appropriate bargaining unit.

(b) Acting as the exclusive collective-bargaining representative of the facility technicians or the facility utility workers employed by Respondent SMI of Worcester, Inc. unless and until Respondent Local 411 has been certified by the National Labor Relations Board as the exclusive bargaining representative of any such employees in an appropriate bargaining unit.

(c) Giving effect to the 31 August and 14 September 1982 collective-bargaining agreements executed by Respondents SMI of Worcester, Inc. and Local 411, and any modifications or current extensions thereof.

(d) Warning employees that they will be disciplined for engaging in lawful activity on behalf of another labor organization and threatening the discharge of employees for refusing to execute union membership applications pursuant to a union-security agreement.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affimative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with SMI of Worcester, Inc. reimburse SMI's past and present employees, except those who voluntarily joined Local 411 prior to 31 August 1982, for all Local 411 dues withheld from their pay pursuant to the collective-bargaining agreements executed on 31 August or 14 September 1982 by SMI and Local 411 covering facility technicians or facility utility workers, plus interest, which is to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

(b) Post at its business office and meeting hall copies of the attached notice marked "Appendix B."[7] Copies of the notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent Local 411's authorized representative, shall be posted by Respondent Local 411 immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Local 411 to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Furnish the Regional Director for Region 1 signed copies of the aforesaid notice, in the number designated by the Regional Director, for posting by Respondent SMI at places where it customarily posts notices to employees at its Worcester, Massachusetts location.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent Local 411 has taken to comply.

[7] See fn. 6, above.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT recognize and bargain with Local 411, International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, as the collective-bargaining representative of our facility technicians and facility utility workers until Local 411 has been certified by the National Labor Relations Board as the representative of any such employees, and WE WILL NOT give effect to the contracts executed on 31 August and 14 September 1982, purporting to cover such employees, or any modifications or current extensions thereof.

WE WILL NOT recognize or bargain with Local 411 or any other labor organization at a time at which such labor organization does not represent an uncoerced majority of the employees in the appropriate bargaining unit.

WE WILL NOT threaten to discharge employees for refusing to execute union membership applications pursuant to a union-security agreement and WE WILL NOT coercively interrogate employees about union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse our past and present facility utility workers and facility technicians, except those who voluntarily joined Local 411 prior to 31 August 1982 for all Local 411 dues withheld from their pay pursuant to the collective-bargaining

agreements signed by us and Local 411 on 31 August and 14 September 1982.

All of our employees are free to become, remain, or refrain from becoming or remaining members of Local 411 or any other labor organization.

SMI OF WORCESTER, INC.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT bargain with SMI of Worcester, Inc. or otherwise act as the collective-bargaining representative of the facility technicians and facility utility workers of that Company until we have been certified as such representative by the National Labor Relations Board, and WE WILL NOT give effect to the contracts executed on 31 August and 14 September 1982, purporting to cover such employees, or any modifications or current extensions thereof.

WE WILL NOT accept recognition from employers, or execute and give effect to collective-bargaining agreements, at a time when we do not represent an uncoerced majority of employees in the appropriate bargaining unit.

WE WILL NOT warn employees that they will be disciplined for engaging in lawful activity in support of another union and WE WILL NOT threaten the discharge of employees for refusing to execute union membership applications pursuant to a union-security agreement.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse SMI's past and present facility utility workers and facility technicians, except those who voluntarily joined Local 411 before 31 August 1982 for all Local 411 dues withheld from their pay pursuant to the collective-bargaining agreements signed by us and SMI on 31 August and 14 September 1982.

LOCAL 411, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO

DECISION

STATEMENT OF THE CASE

BERNARD RIES, Administrative Law Judge. This proceeding was heard in Boston, Massachusetts, on May 2, June 13–15, and July 20–21, 1983.[1]

Briefs were received from all parties (except Local 1228, International Brotherhood of Electrical Workers, AFL-CIO, which also did not appear at the hearing) on or about October 11, 1983.[2] On the basis of the entire record, the briefs, and my recollection of the demeanor of the witnesses, I make the following findings of fact, conclusions of law, and recommendations.[3]

I. THE ISSUES PRESENTED

Respondent SMI of Worcester, Inc. is engaged in the business of managing for its owner, the city of Worcester, Massachusetts, an entertainment arena called the Centrum. The principal allegation of the complaint is that on August 26, 1982,[4] Respondent SMI granted recognition to, and on August 31 executed two collective-bargaining contracts with, Respondent Local 411, IATSE, covering, respectively, "full-time and regular part-time facility technicians" and "full-time and regular part-time facility utility workers, including members of the change-over crew" employed at the Centrum, at a time when Respondent IATSE "did not represent an uncoerced majority of the employees in either of the two units . . . and notwithstanding the fact that at the time Respondent SMI did not employ a representative segment of its ultimate employee complement." By so doing, it is alleged, both Respondents violated relevant sections of the Act. In addition, the complaint asserts the commission of various other unfair labor practices by both Respondents, as more fully discussed hereafter.

II. THE BASIC FACTS

The events in this case were essentially played out on two parallel courses of action. On the first course, Union and management dealt with one another; on the second course were the employees, whose representation for purposes of collective bargaining was a topic of the deepest concern to those on the first course. The two paths occasionally intersected.

Antonio G. Tavares has been since September 1981, the president and general manager of Respondent SMI, which engages only in the business of managing the Cen-

[1] The complaint issued on December 6, 1982, on a charge in Case 1-CA-20298 filed on October 4, 1982, and amended on November 22, 1982; on a charge in Case 1-CA-20359 filed on October 20, 1982, and amended on November 19, 1982; and on a charge in Case 1-CB-5588 filed on October 20, 1982, and amended on November 19, 1982.

[2] Respondent SMI of Worcester, Inc. has also filed a motion to strike portions of the briefs filed by the General Counsel and Massachusetts Laborers' District Council. No opposition to the motion has been received. The motion is granted, except to the extent that it would require submission of revised briefs, an unnecessary gesture, and an award of counsel fees to Respondent SMI, an unauthorized disposition of Government funds at this stage of the game, see Equal Access to Justice Act, 5 U.S.C. § 504

[3] Certain errors in the transcript have been noted and corrected.

[4] All dates hereafter refer to 1982 unless otherwise noted.

trum. He testified that the anticipated completion of construction of the Centrum was continually delayed over a period of years, and that during his tenure, the projected opening date changed from January 1982 to April to June to July to the actual date of September 1, 1982.

Although no employees began working at the Centrum until August 1982, their representation was the subject of discussion by a Centrum attorney and an International representative of the IATSE International Union as early as December 1981. William A. Whiteside Jr., a member of the Philadelphia law firm which represents Respondent in this case, testified that, in the course of some negotiations in Philadelphia with IATSE on behalf of Respondent SMI's parent corporation, he mentioned to Edward Paul, an IATSE International representative headquartered in New York, that the Centrum was under construction in Worcester "and we would probably want to sit down with him and talk about that."[5] There may have been some telephone conversations between Whiteside and IATSE thereafter, but the parties apparently did not formally meet to discuss the Centrum until April 1982 in Whiteside's Philadelphia office.

At that time, according to Whiteside, he discussed with Paul and Al DiTolla, the assistant to International President Walter F. Diehl, the concepts which he and Tavares had formulated for staffing the Centrum. One such concept had to do with providing a special employment context for training and advancement of workers. More importantly, I deduce from the testimony of both Whiteside and Tavares, were some other objectives.

One was to avoid having to deal with Local 96, IATSE, a stagehand and projectionist local having jurisdiction over the Worcester area; rumors about the unsavory and unreliable leadership of that local, together (perhaps) with concerns about the age and training of the members, had made Whiteside and Tavares determined not to bargain with the Worcester IATSE local. A concurrent objective, however, was to deal with IATSE in *some* way, so that the traveling IATSE-organized "yellow card" shows, such as Ice Capades and Ringling Brothers, would be amenable to performing at the Centrum.[6] And, together with this perceived organizational need, there was a corollary desire that IATSE be the only union to represent the Centrum employees on a "wall-to-wall" basis, to make, in Whiteside's words, "absolutely certain that there could be no, if possible, jurisdictional disputes."[7]

At the April 8 meeting, Whiteside spoke to Paul and DiTolla of these concepts (and, as well, of his notion of giving the stagehands independent contractor, rather than employee, status).[8] There were not, however, as Whiteside put it, what one "might think of as negotiations" on April 8.

Paul testified that International President Diehl met in Worcester with the officers of Local 96 on two occasions in April, and on the latter trip "discussed with Mr. Tavares the problems with 96."

At another meeting in Philadelphia a month later, Whiteside, Paul, and DiTolla "did talk about specifics with respect to what a labor agreement might look like," and before the end of June, Whiteside had prepared three draft bargaining agreements, one to cover stagehands;[9] one for a category known as facility technicians, who were to work full-time doing carpentry, electrical work, plumbing, and similar maintenance tasks; and the other for "facility utility workers," most of whom were to work part-time, principally at changing the configuration of the arena to meet the needs of each new attraction. These drafts were discussed with Paul and DiTolla at another meeting in early June, and DiTolla noted several items needing modification.[10]

A negotiating meeting, to be held on July 8 in Philadelphia, was not fruitful because DiTolla was called away at the last minute, and Paul was not technically prepared. After a discussion with Paul about the continuing problem of the identity of the bargaining representative-to-be, Whiteside wrote a letter to IATSE President Diehl on July 13. The letter confirmed a July 9 telephone conversation with Diehl in which various reservations had been expressed by Whiteside about Local 96 and then made the following rather remarkable declaration, especially given that it was made more than a month before the first employee started work: "Therefore, we will not permit The Centrum management to enter into Agreements with the current Local in Worcester. We have however, enjoyed a good relationship with IATSE over the years and have no objection to entering into a relationship with the IA or a new Local."

On July 14, Whiteside sent to DiTolla revised copies of the draft agreements (marked "New Draft") incorporating the changes DiTolla had earlier requested. In his cover letter, Whiteside noted, inter alia, that the parties "had hoped to finalize these in Worcester last week" but had been prevented from doing so by DiTolla's absence.

During this period, in Providence, Rhode Island, about an hour's drive from Worcester, one George Clisas,[11]

[5] During the same time period, according to Tavares, he also made contact with an IATSE representative named Bernard Lynch, whose status will be discussed later, to express his reservations about dealing with the IATSE local in Worcester once the arena opened; Lynch put Tavares in touch with the IATSE International president, Walter Diehl, and some of his aides.

[6] Whiteside was not hesitant at the hearing about expressing his belief in the importance to the Centrum of being able to attract these shows by virtue of an IATSE affiliation. On brief, SMI states that "it was highly likely right from the planning stages that IATSE would need to have a significant role at the Centrum."

[7] At a previous employment, Tavares had the undoubtedly painful experience of bargaining with 19 unions.

[8] The complaint here does not concern itself with the recognition ultimately accorded to Local 411 for the stagehand unit.

[9] This, actually, was not a bargaining agreement but rather a "memorandum of understanding" which treated the stagehands as "independent contractors" and the Union as a provider of such independent contractors, and which set out various terms and conditions of employment of the stagehands.

[10] Paul, on the other hand, testified that the June meeting was devoted solely to the point that "Whiteside wanted to negotiate with the International, he didn't want to negotiate with 96, that's basically what it amounted to." He also said that the "April, June and July" meetings were "primarily" addressed to the "problem of Local 96 and we didn't get into negotiations at all during those meetings."

[11] This name receives various spellings in the record. I have chosen this one arbitrarily.

then the business agent for IATSE Local 23 in Providence, began to enlist Providence citizens as applicants for jobs at the Centrum. Dennis Brophy testified that his friend Clisas called him as early as March or April 1982[12] to inquire if he was interested in working at the Centrum, and he shortly thereafter had Brophy sign an already filled-out IATSE membership application and an authorization card with the numerical designation of the local left blank. Brophy quoted Clisas as saying that if he wanted the job, he "would have to join IATSE."

A week or two thereafter, Brophy traveled with Clisas and four other men, including a Local 23 steward, to the Centrum. There they met Bernard Lynch, referred to by Tavares at the hearing as the "northeastern field representative" of IATSE, by Whiteside as "the Union BA that services . . . that area of the country," and by Paul as "the trustee of Local 192 in Boston . . . acting as an international representative of Boston" and also as person who "handl[es] assignments in the New England area . . . under assignment from [the] general president." The travelers and Lynch went into the SMI office next to the building site; when Tavares came in, he took Clisas and Lynch into his office. During this visit, the would-be employees filled out employment applications.

"[A]bout June," Brophy testified, Clisas called and asked him to come over to sign a new authorization card, saying that the "dates were wrong on the first one." At this time, when Brophy inquired about the terms of employment at the Centrum, Clisas pulled out of his briefcase a bargaining agreement marked "New Draft."[13] Brophy examined the document and pointed out to Clisas that the wage schedule contained no increase in the year 1983. Clisas responded that "that's the way Tavares wanted it."[14]

Joseph Heelon, a member of Local 23 in Providence, gave similar testimony. He said that in July he received a call from Clisas asking about his interest in a job in Worcester at "eight dollars and change an hour." The next day, Heelon went to Clisas' house, where Clisas told him that he had erred as to the wage and showed him a copy of the draft agreement providing for $9 for facility technicians. Clisas also told Heelon that he had to sign (but not date) "an IATSE card."

On August 5, Heelon went to the Centrum with Clisas, Anthony DiSano (also an applicant for a facility technician job), and another person. Heelon was interviewed and he filled out an application form.[15]

Both Brophy and Heelon testified that they again went to Worcester in August, together with Clisas and a dozen other applicants; five of these men from Providence (Brophy, Heelon, DiSano, Gusti Rea, and Richard Cedrone) became the majority of the 7-man facility technician unit which began work a week later, on August 16; the other travelers on that day included William Roberts Sr., who became the first facility utility worker, and a group of stagehand applicants. On this trip, probably around August 9, the men were met by IATSE representative Lynch. Apparently most of these men had already been hired, although Gusti Rea testified that this was his initial visit to the Centrum and that he was hired on the spot. According to Heelon and Roberts, the Providence employees did two things that day: they had their pictures taken for identification tags; and they were escorted one by one by Clisas and Lynch into the empty office of an SMI executive and required to sign a charter for a new IATSE local, about which we will hear more later.

The third employee to testify about his travels with Clisas was William Roberts Sr., who said that Clisas first sounded him out about his interest in working at the Centrum in early April. He went with Clisas and some others, including Cedrone, to the Centrum in June, where Clisas handed him a job application which he filled out. Roberts was on the trip in August on which about 15 Providence people had their pictures taken for identification tags. Roberts testified initially that, in the reception area on that visit, Clisas gave him an IATSE membership application and an authorization card to sign, saying "You know we're forming a union here and in order to belong—in order to work here you have to belong to the union."

Respondent SMI urges that the testimony of Brophy and Heelon be discredited. Presumably, Respondent would be interested in findings that Clisas did not tell the two employees that they had to sign union cards in order to work at the Centrum, and perhaps that Clisas had never had a copy of the draft bargaining agreement, at least as early as July. Clisas did not testify and no one directly represented the reason for his absence, although there was some unobjected-to hearsay testimony about an attempted suicide at some uncertain date.[16]

Most of the testimonial problems pointed out by SMI have to do with explicable errors in dates and an arguable effort by Heelon and Brophy to be consistent with each other. The only matter which seems worth discussing as to Heelon is the fact that while Heelon testified that Clisas had told him in June that his rate at the Centrum would be $9 per hour, his affidavit has Clisas putting the figure at "a little above $9/hour." At the hearing, Heelon took the position that the affidavit was inaccurate and his present memory better. This is troublesome, particularly since on direct examination Heelon had said that he "believe[d]" he had seen "at that time" that he went to Clisas' house in June the draft contract

[12] As SMI points out on brief, Brophy's pretrial affidavit states that Clisas first called him in June. However, since Brophy's job application is dated April 23, I assume that the affidavit is in error.

[13] As stated earlier, Whiteside had sent contracts with such markings to DiTolla on July 14, with copies to, inter alias, Paul and Tavares. It would therefore appear that Brophy would not have seen the agreement as early as "about June."

[14] At the hearing, Whiteside explained that the contract was drawn that way for the benefit of touring attractions.

[15] Respondent SMI challenges Heelon's credibility on the ground, among others, that Heelon's application form, in evidence as SMI Exh. 14, does not support his testimony that he did not finish filling it out. But the fact is that Heelon did not complete the "Reasons for Leaving" his previous jobs, made no markings in the "Experience" section of the form—which does not necessarily, but could, mean that he did not have a chance to do so—and did not affix his signature in the signature block.

[16] Counsel for SMI stated that he was not interested in offering this testimony for its substance, but only to establish that Brophy had a post-September 2 conversation with Clisas, which he had denied at the hearing.

showing a $9 wage scale; on cross, however, he was less than sure which of a number of visits made to Clisas' house was the one on which he saw the contract, but thought it was that same day as the wage reference.

Nonetheless, the description of the hurried circumstances under which Brophy and Heelon gave their affidavits suggests that there was room for error.[17] I must say that although Brophy was, personally, a fairly impressive witness, his testimony is flawed enough to arouse strong suspicion about his reliability.[18] I was more impressed by Heelon, who seemed a bright and thoughtful person. Despite the inconsistencies in their testimony, including some not discussed here, I am inclined to accept their basic accounts, especially in view of the absence of any contradiction and, as discussed hereafter, the effectively corroborative testimony of William Roberts and perhaps Ed Paul.

The vacillation in the testimony given by William Roberts Sr. is worthy of comment. When he first testified for the General Counsel, as shown above, Roberts said that when he and others went to the Centrum with Clisas in August, Clisas told him that "we're forming a union here and . . . in order to work here you have to belong to the union." On the final day of hearing, however, Roberts was called again, this time as a witness for Respondent Local 411, and he revised his recollection of what Clisas had told him:

> He said we are forming a union here. It is going to be called Local 411, and we would like to have everybody join the union that is going to work here.

Roberts went on to deny that Clisas had said that if he "wanted to work at the Centrum, he had to sign that card." When his previous testimony was read to him, he commented, "That was misinterpreted . . . the words were put in the wrong place."

Further examination elicited the testimony that no SMI representative had talked to Roberts about returning to testify, and that the only Local 411 representative who had spoken to him on that subject was its counsel. It was developed that the latter had called and arranged to meet Roberts on the day before he reappeared, in order to ask him "a few more questions." When they met (together with Gusti Rea, who also testified for Respondent Union), counsel had asked him "was I threatened, was I forced to sign it"; his answers were negative. However, and most improbably, Roberts denied that counsel had asked him to "repeat to her the words that George Clisas used when he was asking [Roberts] to sign those cards back in August," thus leaving the impression that counsel had put him back on the stand on the basis of nothing more than his simple assurance that he had not been "threatened" or "forced."

It seems evident that someone got to William Roberts between June 14 and July 21 and engaged in subornation of perjury. Roberts did not initiate his own change of heart, and whoever did undoubtedly told him what to say. For my part, it is sufficient to say that I credit Roberts' first version, not his second.

The record shows that seven "facility technicians" (Brophy, Heelon, Rea, Cedrone, DiSano, Andrews, and Apholt[19]) began work at the Centrum on Monday, August 16. Roberts also started on that day, in the classification known in one of the draft bargaining agreements as a "full-time facility utility worker"; the second such full-time employee, Stephen Fotos, began working on August 26 (presumably having been hired sometime before). Three more employees began employment on August 25 in the category soon to be known contractually as "regular part-time facility utility workers," and an additional 12 employees started employment in that capacity on the following day.[20]

After Whiteside sent out the "new" drafts on July 14, the parties had "general discussions" on the telephone. Donald Siegel, an IATSE attorney in Boston, called Whiteside at some point to talk about "the pending opening of the Centrum and the need to get together again," and a meeting was accordingly set for August 20. Prior thereto, pursuant to a discussion between Whiteside and Siegel about obtaining a card-count certification by the American Arbitration Association (AAA), Whiteside, on August 13, sent Siegel a copy of a form he had used in another matter. Whiteside testified that "final agreement" to the three contracts was reached "verbally" at the August 20 meeting, but that it was understood, as it had been all along, that the contracts would not be signed until the AAA had certified that the Union represented a majority of the employees in the technicians unit and the utility workers unit.[21]

Notes made by Whiteside on August 20 suggest that the principal subject discussed was the certifications. These notes show, inter alia, discussion to the effect that the technicians unit presently consisted of seven employees, that SMI "probably will not hire part-time" in that classification, and that the technicians "for the most part (6 of 7) are people IATSE recommended." As for the utility workers, one was working and "we envision only one." It was agreed, according to the notes, that the certification was to be conducted at 10 a.m. on August 26 in Siegel's office in Boston; it was further noted that "Bernie [Lynch] will bring cards to Don Siegel's office." Tavares testified, although no one else did, that Lynch was present at the August 20 meeting.

The last-noted entry raises an interesting question: what were the cards as to which Whiteside had every apparent confidence on August 20 that Lynch "will bring" to the August 26 certification meeting in Siegel's

[17] Brophy was going to his grandmother's funeral that day.

[18] As later discussed, I think that Brophy probably lied about the extent of a conversation he had with a Laborers representative on September 28. I also think that his insistence that he had no conversations with Clisas after September 2 was untrue; Tavares' subsequent testimony that Brophy had recounted such a conversation to him had a truthful ring and was not rebutted by Brophy. There are some other problems which I see no need to detail.

[19] So spelled in G.C. Exh. 7.

[20] These figures are taken from payroll records subpoenaed by the General Counsel from SMI. The records may be slightly incomplete, since they evidently cover a period when accounting mistakes were being made.

[21] At this meeting, SMI abandoned its interest in hiring the stagehands as independent contractors. Contrary to Whiteside, Paul testified that no agreement on wages was reached at the August 20 meeting.

office? It turned out, according to the employee testimony, that these were cards subsequently collected by Lynch at the Centrum, apparently on August 23, 3 days after the August 20 meeting.

Brophy, Heelon, and Roberts testified that, on August 26,[22] Lynch came to the facility and met with the eight full-time workers in the storage area. He told them that he "wanted us to fill out another card," explaining that he had "lost" or "misplaced" their earlier cards. All the employees signed. The cards already had filled in the numerical designation of the Local as "411."[23] It appears to be the fact that these are the cards which were used in Siegel's office in Boston on August 26, when the regional director of AAA compared seven cards purportedly signed by facility technicians against W–4 forms and a list of seven employees furnished by SMI and found that the technicians wished to be represented by Local 411. Similarly on August 26, having been assured by SMI that it only employed one "facility utility worker" as of that date, the AAA director issued a similar certification for that group on the basis of Roberts' card.[24]

The foregoing references to "Local 411" may leave the reader confused, since no earlier allusion to such an organization has been made. There follows all that we know about that entity.

It will be recalled that Whiteside's July 13 letter to Diehl reiterated the position that while Whiteside would "not permit the Centrum management" to bargain with Worcester Local 96, he had no objection to entering into a relationship with the IATSE International Union "or a new Local." Perhaps it should be no surprise, then, that a "new Local" soon materialized.

According to the testimony of Paul, in the first part of August, Centrum facility technician Don Apholt (later appointed a steward by Paul) either brought or sent in to the International offices in New York an application for the purpose of chartering a new local at the Centrum. As Respondent SMI's brief puts it, the application was "signed by a number of individuals from Local 96, seeking to organize a new local in Worcester."[25] One of the names on the application is that of Thomas E. McAuley, which is also the name of the business agent of Local 96. The charter was issued by President Diehl on August 15, Paul testified.

Apholt did not testify. Paul, however, said that he himself had no contact with Apholt about setting up Local 411, and that to his knowledge President Diehl had nothing to do with it. He agreed with the statement that "just a group of 15 employees, many of which belonged to Local 96, got together [and] submitted a charter for a new local in the Worcester area."

I do not believe that, and I am sure that Paul does not either.[26] It is plain as can be that Paul, who had played an intimate part in this matter from the beginning, fully understood that someone—probably him—inspired Apholt and others to sign the charter application in order to satisfy the need voiced by Whiteside. The alternative—that this represented a spontaneous decision by rank-and-file employees that it would be nice to create a separate IATSE local at the Centrum—is not worthy of further discussion.

On Monday, August 30, Whiteside mailed copies of the agreements to Siegel, pointing out certain changes (such as the inclusion of the numerals 411). In his covering letter, he asked Siegel to call after he had reviewed them, "and, when we speak, we'll make final arrangements for execution on Thursday," which would have been September 2. In fact, however, the parties met in Worcester on August 31, the day after Whiteside's letter was sent, to execute the agreements. No explanation for this change of plans was given at the hearing.

Although Whiteside testified that the parties had reached final agreement "verbally" on August 20, Paul said they had not done so and that "right up until August 31st, the day of August 31st, we hadn't finalized a number of questions that came up." He also depicted a bargaining session on August 31 in which they "reached agreement late at night . . . quite late" after almost 5 hours of bargaining, following which the agreement was then typed and signed; but he almost immediately thereafter agreed that they signed typed copies of the agreements which had been brought by SMI counsel from Philadelphia, which were not revised that evening in any respect, and which he did not negotiate about in any way but rather only, as previously instructed by DiTolla, "check[ed] the clauses of the [stagehands] contract to see that they were in order."[27]

The first performance at the Centrum took place on September 1, with the presentation of an orchestral concert; but the real inaugural event occurred on September 2, when Frank Sinatra appeared. Clisas was present on the day of, and preceding, the Sinatra concert. It appears that he became angered when it was made clear to him that he would not be employed by Tavares as the production manager, a job which he apparently had his eye on, and he may have provoked the stagehands to walk out after the show ended.[28]

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[22] I think they erred by 3 days on this point. The date shown on the cards in evidence is August 23.

[23] In his first appearance, William Roberts testified that Lynch had said the other cards were lost and "you've got to sign up some more cards." In his second incarnation, Roberts had Lynch saying that the cards had been misplaced, "and he would like to have us fill out another card." Gusti Rea, who said that this meeting took place shortly before lunchtime, and who had assertedly not signed a card before, signed the card at the behest of the "elderly man " who told the employees that he had misplaced his records and "wanted all of us to sign the cards." Rea, an uncomplicated older man whose fluency in English is not breathtaking, was "anxious to have my lunch so I signed my card and walked away." Rea had previously heard that Local 411 was "going to represent the employees at the Centrum."

[24] As set out above, by August 26, 1 other full-time, and 15 part-time, utility workers were employed at the Centrum.

[25] The application, which is not in evidence, is presumably also signed by the Providence employees who were required to sign in August by Lynch and Clisas.

[26] An amiable man, Paul was also an incredible witness. Among other things, his testimony concerning the "problem" which the International President sent him to Worcester to investigate in July, without identifying "what the problem was," and his visit to Lynch, who "knew what the problem was" but did not tell Paul, is truly nonsensical stuff.

[27] As to the other two agreements, Paul was told to look for nothing, DiTolla saying "they were okay, they'll be okay."

[28] I refer to this in order to acknowledge Respondent SMI's argument that the testimony of Brophy and Heelon is not reliable because they are probably angry at IATSE for its failure to give support to their friend

Continued

In early September, having received them from Paul, Apholt began passing around membership applications for Local 411, but the technicians refused to sign them. Also in early September, Brophy approached the Laborers' District Council to express an interest in representation, and he was given authorization cards to pass out.

On September 13, Paul showed up at the Centrum. When asked at the hearing why he had returned to Worcester at that time, Paul first made reference to the membership applications which he had given to Apholt; but then he said that he visited "just to see how things were, how everything was going with the shows, and so forth." After meeting with Tavares, he "walked around" and happened to meet Apholt, "and that's when he told me that the technicians would not sign applications."[29] Paul, with Apholt, went looking for the technicians and found four of them (Brophy, Heelon, Cedrone, and Rea) in the engineer's office.

According to Brophy, Paul angrily told him "if I don't fill out that application that I'd be fired." Brophy protested that they had already filled out applications for Clisas and Lynch, but Paul said that" anything to do with them guys is invalid." Nonetheless, Paul at the same time insisted on the validity of the August 31 bargaining agreement, which he took from his briefcase. After discussion, including some sniping by Brophy as to why there was no 1983 raise and an assertion by Paul that the omission was a typographical error which would be corrected if Brophy signed the application, Paul said that he would have Tavares come and speak to the employees later that day.[30]

About 4:30 p.m. that day, at the end of the shift, Tavares came to speak to all the full-time employees.[31] He said that he thought the contract was a good one, and he told the employees that they could be discharged if they did not join Local 411, as he himself eventually (although not at first) testified.[32]

Pursuant to an arrangement with Tavares, having assertedly told Tavares that he had "concerns about . . . some representations that had been made," Paul also met later that afternoon with the part-time utility workers, who began a second shift about 6 p.m. It was the burden of Paul's testimony that he wanted to meet with the 18 or so utility workers because of "rumors" he had heard that Clisas, in signing them up, had told them "that if they didn't sign cards they wouldn't work." He testified that he could "truthfully say that they, on the whole, all said that they had been threatened by Mr. Clisas." He then purportedly told them that "whatever Clisas said to you is wrong; he had no right to do so"; spoke to them about "the advantages of belonging to the IA"; asked them to sign authorization cards which he happened to be carrying, saying it was "entirely up to them"; and walked away with 16 signed cards. No other witness testified about the meeting.

Paul's explanation of his decision to meet with the part-time utility workers is very difficult to pin down. Although, as indicated, he testified at one point that he had returned to Worcester on September 13 "just to see how things were, how everything was going with the shows, and so forth," he stated on further questioning, "Well, with all the rumors that were around about signing the cards and the laborers being involved, I suppose that was in the back of my mind also." Paul went on to say that the word had gotten to him in New York, and he had discussed with DiTolla, that the Laborers Union had shown an interest in organizing the employees—how he heard this, he did not say.

Paul thereupon took this opportunity, he testified, to inquire of the part-time utility men about "rumors" he had earlier heard concerning Clisas' activities. At what date he first became aware of these "rumors," there is no certainty. At one point, he testified that as early as July, President Diehl had sent him to Worcester "because some people were up there representing the International without his specific instructions"; that he conducted an investigation; and that he found that Clisas was "doing things that . . . he shouldn't have . . . just being in the area and just approaching people."[33]

Paul said that when he got to Worcester on this July trip, he spoke to Lynch and Tavares, but did not discuss Clisas with the latter, and the former only told him that Clisas was a "good man and all of that." However, after speaking to Lynch and discussing Clisas, he still did not "identify what the problem was and who was causing the problem." When asked if he ever did get such information, Paul testified that "some of the [Local] 96 people

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Clisas. It may be that they harbor such hostility, and that that was what led Brophy to soon thereafter embrace the Laborers Union; I do not know. But, as indicated, there is simply too much confirmation of the uncontradicted testimony of the two witnesses in this record, including Roberts' testimony and also Paul's testimony that he heard from the *utility workers* that Clisas had coerced them into signing, as later discussed.

[29] It seems clear that Paul already knew this; as noted, he first answered the question, "And for what purpose did you return to Worcester?" by saying "Well, I had given Apholt applications and asked him to pass them around to employees." He very likely had heard of the reluctance of the employees to sign the membership applications.

[30] Insofar as the foregoing is inconsistent with Paul's testimony—and it is—I credit Brophy, who was substantially corroborated by Heelon.

[31] Tavares and Paul gave the impression at hearing that the former just chanced to be passing the group and was called over. I believe, however, that the second meeting was arranged so that Tavares could try to pacify and/or subdue the rebellious employees.

[32] "There was a question of a union shop rate [sic]. This is a union shop, you have to join the union. Doesn't it say that in the contract. And I said, 'Yes, it says that in the contract and we intend abiding by the contract.'" Paul also testified that at this meeting Tavares was asked by an employee if it was "true that if we don't sign the application we could be fired" and that Tavares had replied, "Under the terms of the union security clause, yes, that is possible."

[33] Subsequent probing of Paul's marching orders resulted in the following:

Q. (Mr. Griffin, resuming) Now, Mr. Paul, when you went up to investigate the problem at the Centrum, let's put it as simply as possible, what did Mr. Diehl say to you?

A. (The witness, resuming) He just told me to go up to Worcester and see what's going on.

Q. Did he give you specifics?

A. No.

JUDGE RIES: You mean that's all he said to you, go to Worcester and see what's going on there?

THE WITNESS: Right.

JUDGE RIES: Did you ask any questions?

THE WITNESS: I said what do you want me to look for. He said see what's going on, I hear there is trouble up there, go up and see what's going on.

that I met relayed information to me . . . that Mr. Clisas . . . was trying to take over the arena and he was from a local in Providence and they resented this."

The "rumor" as to the alleged coercion by Clisas of the part-time utility workers also assertedly came from Local 96 members, but arguably at a different time. Paul said that it was on September 2, when he and DiTolla came to Worcester to attend the Sinatra opening concert, that "Local 96 people" told him about Clisas' coercion of the part-time workers. He did not inquire further, however, until September 13, when he convened the meeting of the utility workers and was directly told by them that the "rumor" was true. But in his earlier meetings on September 13 with the technicians, Paul had made no inquiry as to whether Clisas or Lynch had coerced *them* into signing cards; instead, he impressed upon that group the necessity for completing their IATSE membership applications, even though he also told them that what Clisas and Lynch had done was "invalid." When asked why he treated the two groups differently, Paul's answer was not pellucid:

> A. I was concerned with the utility workers. They hadn't even signed cards.
>
> Q. They had signed cards, but they were complaining about the background to the signing of those cards.
>
> A. Yes.

The statement "They hadn't even signed cards" provokes some interest. There is, in fact, no direct evidence in the record that Clisas had ever solicited authorization cards from the part-time utility workers, none of whom had begun working prior to August 25. Although Paul's answer to the subsequent question acquiesces in an assertion that these employees *had* signed cards, it may be that neither Respondent believed that they had, in fact, done so, since the August 26 AAA certification of the utility workers unit was based on only one card, that of Roberts, even though, by that day, one additional full-time utility worker and 15 part-time workers had begun employment.[34]

My guess is that Paul did not gather the part-time workers together on September 13 so that he might undertake an investigation into the "rumor" that Clisas had acted coercively toward them at some earlier time. I think, rather, that one of two explanations is more likely. The first is that (1) somebody may have suddenly realized that the utility workers bargaining unit was a good deal larger than the one-man unit certified by the AAA on August 26, in conjunction with (2) the fact that the Laborers Union, as Paul conceded, was known to be nosing around. On the other hand, a cogent argument can be made that the August 26 recognition of Local 411 on the basis of one card was made in defiance of the known fact that [illegible] employees were working in the unit that day, with the intention of later having a second card check, which is what occurred. It is hard to believe Tavares' testimony that he was unaware that all these new employees had begun work on August 25 and 26, although that is not impossible; but, in any event, both Tavares and Whiteside freely conceded that at the time of recognition on August 26, they knew full well that many more utility workers would soon be joining the unit.

Whatever the explanation for the September 13 signup, there was a flurry of action starting with Paul's collection of cards on that day. The record shows that the Laborers filed a representation petition for the utility workers and the technicians with the Boston Regional Office on September 14. There is no direct evidence that Respondents were aware that the petition would be filed on that day. The Laborers also made a written demand for recognition upon SMI in a letter dated September 13. SMI's date stamp on the letter is September 15, and there is similarly no showing that the Respondents knew on September 13 that the demand letter would be sent that day.

What the record does show is (1) that Paul secured the 16 cards on September 13; (2) that on September 14, Paul went to the AAA office in Philadelphia, where he met counsel for SMI and SMI's director of marketing Weiner; the latter had brought to Philadelphia from Worcester a list of the part-time utility employees and W-4 forms for comparison with the signed authorization cards carried by Paul; (3) that after the signing of the AAA certification that Local 411 apparently represented 16 of 23 facility utility workers, and thus a majority, Paul also signed a new 2-page "memorandum of agreement," which recited the basic history of the fledgling utility workers unit (including "WHEREAS, on September 14, 1982, even though they did not consider it legally necessary, but to avoid any questions, the parties requested the American Arbitration Association to conduct a supplemental card check.") and declared that the parties "hereby restate, acknowledge and renew their agreement to be bound by the terms of their Collective Bargaining Agreement dated August 31, 1982, in its entirety," with the "sole exception" that, effective September 14, the part-time hourly rate was increased by a range of 10 cents to 25 cents per hour, depending on length of service; (4) that Weiner thereupon flew back to Worcester with the supplemental agreement so that it could be signed by Tavares, who had been instructed by counsel that the agreement must "absolutely" be signed that evening "and not to be signed the following day"; and (5) that after signing around 9 p.m., Tavares called counsel Whiteside and Satinsky to confirm that he had done so.

The foregoing describes the primary course of the material events in this record. Other facts relating to some of the specific allegations will be set out infra.

[34] Respondent SMI's witness David Breault, the Centrum building superintendent, testified that the first days of employment of the part-time workers were mainly training and screening sessions, commencing on August 25. While he seemed to be saying that the employees each worked only 4 hours during the training week, the record shows that all 15, who began on August 25 and 26 worked 4 or more days that first week and then on into September on a regular basis. More employees were hired into the unit after August 25–26.

III. THE ALLEGED UNLAWFUL RECOGNITION

A. *The Prerecognition Bargaining*

The complaint alleges that the two Respondents violated the Act by, in August 1982, giving and accepting recognition in, and executing collective-bargaining agreements covering the two bargaining units involved here, notwithstanding that at the time Respondent Local 411 "did not represent an uncoerced majority of the employees in either of the two units . . . and notwithstanding the fact that at the time Respondent SMI did not employ a representative segment of its ultimate employee complement."[35] The complaint does not allege that the negotiations conducted by SMI and IATSE International beginning in the spring of 1982 were also unlawful, but it would appear that they plainly were.

In *Majestic Weaving Co.*, 147 NLRB 859 (1964), the Board held, reversing the rule of *Julius Resnick*, 86 NLRB 38 (1949), that negotiating with a union prior to the achievement of majority representative status constitutes "impressing upon a nonconsenting majority an agent granted exclusive bargaining status," even though the negotiations may be conditioned on the union being able to "show at the 'conclusion' that they represented a majority of the employees." Id. at 860, 866.[36] The foregoing principle unquestionably had application here very probably before, and at least when, on August 20, the parties reached "agreement," according to Whiteside, on the terms of the contracts pertaining to the then-employed technicians and utility worker.

A case could be made for finding a separate violation based on this conduct, certainly as to Respondent SMI. Finding a violation as to Local 411 is somewhat more complicated. The International is not a party to this proceeding. After counsel for the General Counsel had heard the testimony about the preemployment negotiations, he filed a motion, just as the hearing was to resume in July, to name the International as a party and to allege the early negotiations as constituting unlawful "recognition" beginning in December 1981. When I pointed out that there was no evidence of service of the complaint amendment on the International and that, further, the International would be entitled to 10 days in which to answer the proposed amendment, the matter was not pursued.

I also noted that the International might, for some purposes, be considered an agent of Local 411. When that misbegotten creature struggled uncertainly to its feet on, we are told, August 15, it had no officers or agents except the International (according to Paul, a new local is operated by the International until officers are elected, which here occurred in October). It would appear that the bargaining which took place on August 20 was conducted by the International on behalf of Local 411.

At the hearing, counsel for SMI voiced strenuous objection, joined in by counsel for Local 411, to any testimony relating to events prior to August 25, the first date alleged in the complaint. Since it seemed clear to me that occurrences predating August 26 would almost certainly have to be proved in order to establish the allegedly coerced representation, I overruled the objections. Tavares and Whiteside then testified about their pre-August contacts with IATSE in the course of describing the sequence of events.

The issue here is whether it is proper to find Respondents guilty of the obvious violation of law although that violation is not alleged in the complaint. The fact that the relevant testimony was adduced over objection does not seem to matter if in fact the evidence of conduct prior to the August events was arguably material to the other allegations, as I had reason to think it might be. The longstanding test for making a finding of an unalleged violation is whether the matter has been "fully litigated." *Penn Color*, 261 NLRB 395 fn. 2 (1982); *Gogin Trucking*, 229 NLRB 529 fn. 2 (1977). In this case, there can be no question as to the facts, and I cannot imagine that Respondents would have litigated the case in any other way (short of lying about the pre-August events) had they been on notice that the point was ripe for adjudication. In addition, while both Respondents urge on brief that no findings can be made as to pre-August 25 events, they also engage in extended discussions of the proposition that the earlier behavior was perfectly proper.[37]

This issue is troublesome. There can be no doubt about the facts, and thus there seems to be no factual due process issue. The law, furthermore, is clear. But the problem is, as counsel for Local 411 points out, that the General Counsel had "ample opportunity to amend its complaint so as to contain such an allegation." As earlier indicated, counsel for the General Counsel did not attempt to modify the complaint to include the earlier activity until the hearing resumed after a 5-week hiatus. When it was pointed out at that time that service had not been perfected on the International which, furthermore, would be entitled to a period in which to file an answer, the General Counsel, instead of pursuing the issue, chose to abandon the proposed amendment. It is arguable that, by doing so, the General Counsel deliberately exercised his prosecutorial discretion under Section 3(d) to refrain from alleging the unfair labor practices.[38] In this context, the situation seems different from one in which an unalleged unfair labor practice is litigated and the General Counsel gives no affirmative indication that he has considered, but has chosen not to prosecute, such a cause of action.

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[35] Sec. 8(a)(2) forbids an employer, in pertinent part, "to contribute . . . support" to a labor organization. Sec. 8(b), pertaining to labor organizations, has no express counterpart to Sec. 8(a)(2), but the cases have construed Sec. 8(b)(1)(A) (which prohibits union restraint or coercion of employees) to embrace the acceptance of improper support by unions.

[36] Subsequently, in *Wickes Corp.*, 197 NLRB 860 fn. 2 (1972), the Board, without citing *Majestic Weaving*, held that it was enough to support an order of withdrawal of recognition that the employer had "reached an agreement" with the unions "before a majority of employees designated them as their bargaining representatives." The trial examiner's decision (id. at 861) shows that the execution of the agreement was predicated, as here, on the unions "securing authorization cards from a majority of the employees."

[37] Neither brief indicates any awareness of *Majestic Weaving*. It is noteworthy that neither the General Counsel nor Charging Party appears to assert that the pre-contract bargaining may be found to be unlawful here.

[38] "[The General Counsel] shall have final authority . . . in respect of the . . . issuance of complaints under section 10."

Accordingly, while I view the issue as a close one, I shall recommend no findings or conclusions as to the prerecognition bargaining.

B. *The Alleged Coerced Majority*

The central issue more squarely presented by the complaint is whether, at the time of recognition, Local 411 did not represent an "uncoerced majority" of the employees in each of the two bargaining units.[39]

> "The law has long been settled that a grant of exclusive recognition to a minority union constitutes unlawful support in violation of [Section 8(a)(2)]," *Ladies Garment Workers v. NLRB*, 366 U.S. 731, 738, and such "prohibited conduct cannot be excused by a showing of good faith" on the part of the employer and the union, id. at 739.[40] That good faith is no defense follows logically from the fact that, in these cases, employee freedom of choice is the paramount consideration. Where there is employer recognition of a minority union, "More need not be shown, for, even if mistakenly, the employees' rights have been invaded." Ibid.

The Board has repeatedly held that in cases alleging unlawful recognition, it is "the burden of proof of General Counsel to establish that the union accorded exclusive recognition was not the majority representative." *Progressive Construction Corp.*, 218 NLRB 1368, 1370–71 (1975); *Regency Gardens Co.*, 263 NLRB 1265 (1982). In applying this principle, however, the Board has held that it is not incumbent on the General Counsel to affirmatively prove, with anything approaching mathematical precision, that a union did not represent a majority at a critical time, if there is evidence in the record which reasonably tends to cast doubt upon the majority status claimed by the union. In *Clement Bros. Co.*, 165 NLRB 698 (1967), the union had in its possession at the hearing about 129 authorization cards in a unit of approximately the same size. The record showed, however, that prior to recognition a union representative had made remarks to six card-signers about the necessity of signing a card in order to work, and an employer agent had made a similar comment to one employee. The Board held that the General Counsel was not required to specifically prove that another 58 cards necessary to majority status had also been obtained in coercive circumstances: "[the] character of the coercion should be more realistically measured in terms of its pervasive effect." Id. at 699. Taking into account the seven instances of coercion which took place prior to the signing of the contract, as well as "coercive tactics continuing after the contract was signed" (deemed by the Board to "suggest" that "the coercion taking place before the contract was executed was substantially more widespread than appears"), the Board found the Section 8(a)(2) violation alleged.

On petition to enforce, the Court of Appeals for the Fifth Circuit agreed with the Board's conclusion, saying that the Board may use "specific instances of coercion as circumstantial evidence" of widespread undue influence and that the Board was "justif[ied]" in the inference drawn by it. 407 F.2d 1027, 1029.[41] Accord: *Amalgamated Local Union 355 v. NLRB.*, 481 F.2d 996, 1002 fn. 8 (2d Cir. 1973).

In recent years, the Board has drawn such an inference of the absence of an uncoerced majority in a variety of ways. In *Siro Security Service*, 247 NLRB 1266, 1273 (1980), it adopted a "totality of the circumstances" approach proposed by Administrative Law Judge Frank:

> I base this conclusion [that the union did not represent an uncoerced majority on the appropriate date] on the evidence adduced by the General Counsel, the logical inferences derived therefrom, the totality of circumstances (including the haste of Siro in recognizing Allied without an adequate card check), Siro's assistance to Allied in obtaining union cards from its employees both before and after recognition of Allied, the failure of Siro and Allied to accord employees their statutory rights in the application of an otherwise lawful union-security clause, the requirement of Siro and Allied that employees execute check-off authorization cards as a condition of employment, the deduction of union initation fees and dues without such authorization, the evidence that some cards upon which the Union relies in asserting its majority status were obtained fraudulently, and the absence of evidence sufficient to rebut the General Counsel's prima facie case.[42]

The theory underlying *Clement Bros.* and like cases seems to be that while a respondent in an 8(a)(2) case need not initially shoulder the burden of proving a majority, the law requires that there must in fact have been majority support at the time of recognition. That fact of majority support will ordinarily be presumed. But once there is some showing that any earlier-gathered majority, however manifested, might have been obtained or maintained by improper influence, the Board may, in the exercise of its reasoned judgment, require the parties to separate until properly wed.

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[39] There was no clear testimony about the circumstances in which, or by whom, recognition was extended and accepted. Whiteside, when asked when it was that the Union had said that it had a majority, responded, "Somewhere, sir, after or around—I think it was after or around the August 20 meeting. . . . The only time a demand or an evidence of majority status was presented to me was either by Don Siegel or Al DiTolla around the third week of August 1982. . . . Somewhere a couple of days to a week after [the August 20 meeting] . . . . Probably through the telephone as I recall." Tavares testified that no one from Local 411 ever made a recognitional demand on him.

[40] A "minority union" for these purposes includes both a union which has simply failed to secure sufficient support in the unit in which it is recognized and, as well, a union which has obtained ostensible majority support that is tainted by undue influence or coercion and is therefore unreliable. *Distributive Workers District 65 v. NLRB.*, 593 F.2d 1155, 1162 (D.C. Cir. 1978).

[41] The Court apparently did not find it necessary to rely on the postrecognition conduct, stating merely that "[T]he Board inferred from 7 proven instances of coercion that other unproven instances had occurred." It ventured, as well, "The Board might also have inferred that the coercion of the 7 had an indirect effect on others," id. at 1030, although there appears to have been no showing of knowledge by the other employees of the seven instances.

[42] *Siro* was expressly reaffirmed in *Farmers Energy Corp.*, 266 NLRB 722 (1983).

In the present case, there is direct evidence (by Brophy, Heelon, and Roberts) that Clisas told them that they had to sign IATSE authorization cards in order to work at the Centrum. Both Respondents argue that Clisas was not an agent of either the International or Local 411 in so acting, but was rather a loose cannon who rolled into Worcester from Providence. I see no need to marshal the evidence which suggests that the International knew about, tolerated, and perhaps encouraged Clisas' enlistment efforts throughout the period in question;[43] instead, I think it is sufficient that the record tends to show that the employees would have reasonably believed, upon so hearing from Clisas, that they had to sign IATSE cards.

Clisas was the business manager of IATSE Local 23; he recruited the employees and took them to the Centrum; he hobnobbed with Tavares once there; and he handed out applications to the would-be employees.[44] As earlier indicated, what counts here is not culpability, but effect—can it be said that the employees would likely have believed that they had to sign IATSE cards, having been so told by Clisas?

Respondent SMI takes issue with this approach, citing two cases in which, in dealing with the question of representations relating to authorization cards, reference was made to the lack of agency of the person making the representation. It appears to me, however, that at least in *Beaver Bros. Baking Co.*, 198 NLRB 327, 328, 329 fn. 17 (1972), the Board did not attach any conclusive weight to the fact that the fellow employees who made the statements in question were not union agents; rather, the allusions to lack of agency were clearly meant as secondary considerations. The same may be true of *Jas. H. Matthews & Co. v. NLRB*, 354 F.2d 432, 437–438 (8th Cir. 1966), where the Court rejected a contention for "the elementary reason that there is no showing here that Gayler was an agent of the Union or that he was entitled to bind it in any way," but then went on to dispose of the argument on a "[m]ore important" substantive ground.

In any event, what seems to matter here is not agency as much as the apparently authoritative quality of the representations made. Statements by fellow employees as to the meaning or effect of authorization cards, or as to possible union action, are not in the same class as a statement by a union business manager such as Clisas, whose pronouncements about the need to sign cards would obviously be accepted on faith. This approach has been trenchantly stated by Judge Hunter, concurring in the recent *NLRB v. J-Wood*, 720 F.2d 309, 318 (3d Cir. 1983); while Judge Hunter was referring to the standards governing representation elections, there should be no difference, since both here and in that kind of case we deal with the effort to assure that employees have been afforded a right to express their sentiments in an uncoerced setting:

> We set aside elections not to punish a culpable union or employer, but to protect the employees' right to free choice. . . . Thus, the agency of an employee making threats is not necessarily an issue to be resolved before inquiring into the effect of those threats. It is an issue that is important only to the extent that it sheds light on the effect of the threats.

In so concluding, Judge Hunter echoed the philosophy expressed by the Supreme Court in *Machinists Lodge 351 (Serrick Corp.) v. NLRB*, 311 U.S. 72, 79–80 (1940), where the Court held that coercive conduct by nonsupervisory leadmen was cognizable; in view of the "clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence, it was enough that employees "would have just cause to believe" that the leadmen were acting on behalf of management in soliciting authorization cards.

In this case, I find that the employees would reasonably have regarded with solemn respect Clisas' assertion that they had to sign IATSE cards in order to be employed at the Centrum.[45] I also think it fair to infer, under the authority of *Clement Brothers Co.*, that if Clisas made such statements to two of the facility technicians and one of the utility workers, he very likely made similar approaches to the other employees.[46] In addition, although I have earlier registered my doubts on the point, there is the testimony of Paul that "all" the part-time utility workers informed him on September 13 that Clisas had told them "at the time of hiring" that "if they didn't sign cards, they wouldn't have jobs." While I have no faith in Paul's testimony as a rule, this is consistent with that given by Heelon, Brophy, and (initially) Roberts, and it may have happened.[47]

[43] Among other things, there is the evidence that Clisas and Lynch together obtained employee signatures to the charter application for Local 411, an undertaking very much in line with the wishes and objectives of Paul, Whiteside, and Tavares.

[44] Tavares knew Clisas from a job he had held in Providence. He testified that Clisas had come to the Centrum with employees several times by prior arrangement with director of operations Edward Kozlowski, and that on one occasion, when Clisas had said that he needed a place to confer with his people (presumably to sign the Local 411 charter), Tavares allowed Clisas to use the office of the events coordinator. Kozlowski testified that, "at times," he gave to Clisas the employment applications which were to be filled out by his Providence companions.

[45] Clisas probably seemed as much a part of the employment process as did the office employees in *Department Store Food Corp.*, 172 NLRB 1203 (1968), who required applicants to sign union cards. The Trial Examiner held that since the new hires "could reasonably believe" that signing the cards was a part of the hiring process, the cards did not "reflect the free and untrammeled choice of the signers," without regard to "whether management was aware of the conduct of Carlson and Travis or whether Respondent may also be found to have rendered unlawful assistance to Retail Clerks by the manner in which these cards were solicited." Id. at 1207–1208. Accord: *Coca-Cola Bottling Co.*, 146 NLRB 1045 (1964).

[46] Roberts testified that on the visit to the Centrum in early August, when he signed the card for Clisas, the latter also gave cards to "other people." Although Gusti Rea testified that he signed no card until August 23, when he signed at Lynch's behest, I would be reluctant to rely upon his ability to recall what he had done along these lines. I also take note that Rea was present at the meeting with Respondent Local 411's counsel when Roberts purportedly revealed that, in fact, he had not been coerced as he had testified a few weeks before.

[47] Unobjected-to hearsay may be probative. *American Spring Bed Mfg., Co.*, 255 NLRB 692, 693 fn. 4 (1981); *C & D Transfer*, 258 NLRB 586 fn. 2 (1981).

But Respondents would immediately protest that they do *not* rely on the activities of Clisas, that his activities are irrelevant, and that Respondent Local 411 in fact thereafter made efforts to remove the taint of Clisas from the picture. The reply is that they cannot so easily disavow the effects of Clisas' conduct, and that what Respondents did was too little and too late.

Thus, sending Lynch to the Centrum on August 23 to collect more cards, and having him say, at a meeting on company time of all the newly hired full-time employees, that he had lost the old cards and that they had to sign new ones, hardly conveyed to them that they had more of a choice in the matter than Clisas had held out.[48] Indeed, in this continuum of coercion, Lynch's presentation at a meeting on company premises sponsored by Respondent SMI may have seemed to bespeak even more compulsion than Clisas' approaches. Thus, I would consider that the cards secured by Lynch on August 23 represented no more of a free employee expression than the cards previously demanded by Clisas.

The course of events in the utility workers unit took a different path, as earlier set out. After the August 26 recognition and the August 31 contract, Paul met with the part-time utility workers on September 13 and allegedly asked them to sign authorization cards; 16 of them did.

SMI argues that the utility workers understood that they had a choice to sign or not. The argument is based on Paul's testimony that he "did tell them that if they didn't sign a card, that was entirely up to them," and that there were some in attendance "that didn't sign cards" at the meeting. Paul is one of those witnesses whose uncorroborated testimony I would not be inclined to accept, even when it is not controverted. But in *Plasterers*, 207 NLRB 147, the standard applied by the Board was that a trier of fact "need not accept uncontradicted testimony as true if it contains improbabilities or if there are reasonable grounds for concluding that it is false," and that "demeanor may be considered" in making this judgment.

In the present case, there are no inherent "improbabilities" in Paul's account of his meeting with the utility workers on September 13, nor do I recall that his demeanor was any less persuasive than usual when he testified on this subject. There is no contradictory evidence on the issue, even though there were at least 16 potential witnesses. Aside from my belief about Paul's general credibility, however, there are two items which might raise a doubt about Paul's version of the September 13 meeting.

The first is that one of the 16 cards offered in evidence as having been signed on that date bears the signature of employee Mitchell Gill, but the only payroll record in evidence shows that Gill did not work on that date. This discrepancy was not noted at the hearing, and in view of the fact that the payroll evidence is actually a summary of underlying (and unproduced) records, it may be that there was a mistake in transcription. The second is the arguable slip made by Paul at the hearing—the utility workers "hadn't even signed cards"—which may indicate that Paul was fabricating the entire discussion. However, that apparent inconsistency was also not followed up.

In the foregoing circumstances, it is my conclusion that no matter how unimpressed I am with Paul's testimony overall, it would not be appropriate to discredit him on this particular point, although I consider the issue quite debatable.

On this analysis, we are left with (1) the fact of recognition on August 26, when Local 411 had acquired a card from only one utility employee (Roberts), a card which I believe to be invalid, at a time when there were 17 employees in the unit; (2) the signing of a bargaining agreement on August 31, in similar circumstances; (3) the obtaining of 16 cards on September 13; and (4) the execution of the "reaffirmation" memorandum on September 14.

In this setting, it is easy enough to find that the August recognition and contracting were unlawful, in that Respondent Local 411 did not represent an uncoerced majority in the utility workers unit at the pertinent times. The more difficult question is whether the cards secured on September 13 were a proper predicate for the renewed grant of recognition and reaffirmation of contract. I think not. In the *Ladies Garment Workers* case, supra, the Supreme Court held that once the unlawful recognition was granted, it was irrelevant that the union thereafter came to represent a majority of employees at the time of contract execution, since the recognition was a "*fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative," and the recognition itself might have afforded the union a "deceptive cloak of authority with which to persuasively elicit additional employee support." 366 U.S. at 736.

But it can be argued that in the instant case, Paul's uncontradicted testimony that he expressly told the employees on September 13 that Clisas had been "wrong" and that they did not have to sign authorization cards purified the setting, in a way which distinguishes this case from *Ladies Garment Workers*. I am inclined to disagree. For no matter what Paul may have said about Clisas or about the right of the employees not to sign authorization cards, he did *not* tell these surely unsophisticated minimum-wage part-time workers that IATSE did not purport to continue to represent them for purposes of collective bargaining. Having gathered them on company premises under the aegis of the management and apparently on company time,[49] there was no reason for the employees to believe that the union about which Paul was speaking did not continue to be their representative, whatever he may have said about technical matters perhaps beyond their grasp. In such circumstances, there is reason to conclude that, on September 13, the earlier unlawful recognition continued to afford IATSE a "de-

[48] The testimony of several witnesses, including director of operations Kozlowski, shows that Clisas and Lynch were seen together at the Centrum on several occasions. The employees likely would have assumed that the mandatory character of the card-signing as dictated by Clisas was no less operative when sought by Lynch.

[49] The testimony indicates that Paul met with the employees prior to their starting a night shift. I assume that most employees do not arrive at work until minutes before they are to start, and that the meeting described by Paul would have had to spill over into working hours.

ceptive cloak of authority with which to persuasively elicit additional employee support."[50]

I conclude, in accordance with the foregoing, that the evidence gives rise to a reasonable inference that Local 411 did not represent an uncoerced majority of employees in either bargaining unit at the time of recognition on August 26, 1982, or at any time thereafter, and that both Respondents violated the Act by extending and granting recognition on August 26 and by executing bargaining agreements on August 31 and September 14.

C. *The Unrepresentative Complement Allegation*

We turn to the complaint allegation that SMI recognized Local 411 at a time when the former did not employ a representative complement of employees in the two units. This long-established doctrine is designed to prohibit an employer from unlawfully imposing a union upon employees at a time when the employee complement is too small and too unfamiliar with the operation to fairly commit the unhired future employees to a bargaining representative.

The language used by the Board to describe the measuring standard has been broad: e.g., "The correct test is whether, at the time of recognition, the jobs or job classifications designated for the operation involved are filled or substantially filled and the operation is in normal or substantially normal operation," *Hayes Coal Co.*, 197 NLRB 1162, 1163 (1972). The Board has never enunciated percentages to flesh out the word "filled"; as the Board recently noted, it "has not established a per se rule for determining whether there has been premature recognition, but has evaluated the facts to determine whether employees realistically have had an opportunity to select a bargaining representative." *Herman Bros.*, 264 NLRB 439 (1982). The percentages adopted in *General Extrusion Co.*, 121 NLRB 1165, 1167, dealing with the determination in representation proceedings of whether a contract is not a bar to a representation petition because prematurely executed,[51] are "not determinative" in unfair labor practice proceedings, but have been "looked to," *Herman Bros.*, supra.

In the present case, recognition in the technicians bargaining unit occurred when the numeric level of that unit had reached what was apparently a normal operating plateau.[52] In the utility workers unit, recognition was extended at a time when 17 employees were on the payroll; the rather skimpy record shows that in the first 2 weeks of October, the number of employees in that unit was 30–35. There is no indication that the figure increased after that period.

The theory of the representative complement violation looks only to objective facts and figures and not to the validity of representation or independent unlawful assistance. Based on the foregoing data, I would find no violation on this alternative theory.

IV. THE ALLEGED UNLAWFUL ASSISTANCE

The complaint alleges that Respondent SMI violated Section 8(a)(2) by independent acts of unlawful assistance and support to Respondent Local 411 on certain occasions. The instances alleged are the meetings in mid-August, on August 26, and on September 13, when IATSE representatives met with employees on company premises for various purposes.[53]

As the case law has developed over the years, there is "support" which violates Section 8(a)(2) and "support" which does not. The problem lies in determining that shadowy point at which employer assistance goes "beyond legally protected cooperation over into the proscribed domain of interference with the freedom of choice of the employees," *NLRB v. Keller Ladders Southern*, 405 F.2d 663, 667 (5th Cir. 1968).

Former Chairman Edward B. Miller observed in his thoughtful dissenting opinion in *Longchamps*, 205 NLRB 1025, 1026 (1973), that "Board precedent in this area is hardly a model of clarity." Chairman Miller illustrated his contention by comparing the results in *Park Inn Hotel*, 139 NLRB 669 (1962), *Bassick Co.*, 127 NLRB 1552 (1960), *Greystone Knitwear Corp.*, 136 NLRB 573 (1962), and *Columbus Janitor Service*, 191 NLRB 902 (1971), with the contrary holdings in the "quite similar" cases of *Jolog Sportswear*, 128 NLRB 886 (1960), and *Coamo Knitting Mills*, 150 NLRB 579 (1964). See also *Vernitron Electrical Components*, 221 NLRB 464 (1975), which attempts to rationalize three of the foregoing cases by pointing out the factors in each which authorized or dictated the result reached.

Most of these cases, however, raise the question of whether an overall set or series of circumstances alleged as a violation of Section 8(a)(2) resulted in a coerced majority and nullified the recognition extended to the beneficiary union. In the present case, the complaint alleges as separately violative of Section 8(a)(2) a group of discrete events which did not necessarily have anything to do with the extension of recognition (e.g., the September 13 meeting with the technicians). Because of the fact pattern in this case, accordingly, I need not necessarily consider these meetings as part of a continuing process bearing upon the ultimate issue of the validity of recognition, but should rather regard them as separate events.

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[50] *Foremost Appliance Corp.*, 128 NLRB 1033, 1034 (1960), cited by SMI, allows parties "to correct, by appropriate rewriting," an existing contract defective as a bar because of expanding unit or other contract-bar rules . . . ." Contract-bar rules, however, apply in representation proceedings, and do not take into account the circumstances which are pertinent in unfair labor practice cases. Here the evidence is that (1) there was unlawful recognition extended for the utility workers unit; (2) new cards were sought from the gathered employees on company time and premises; (3) the employees were not told that Local 411 did not represent them, but only that they did not have to sign the cards.

[51] "A contract will bar an election only if at least 30 percent of the complement employed at the time of hearing had been employed at the time the contract was executed, and 50 percent of the job classifications in existence at the time of the hearing were in existence at the time the contract was made."

[52] Although I have no authority for the proposition, it would seem that when the recognition is less than plantwide, the "representative complement" doctrine should be assessed in relation to each bargaining unit recognized. The basic question is whether the present employees can fairly obligate the representation of those future employees who will share their particular interests in terms and conditions of employment.

[53] The complaint allegation regarding an August 25 meeting conducted by Clisas and Lynch has no support in the evidence.

The first allegation relates to the assertion that Tavares, on August 23,[54] allowed Lynch to ask the employees for new authorization cards. In *Coamo Knitting Mills*, supra at 582, the Board reaffirmed its position that "the use of company time and property does not, per se, establish unlawful support and assistance. Rather, each case must be decided on the totality of its facts." While there could scarcely be a better case than this one for suspicion that SMI and IATSE were working through this whole representation process hand-in-hand and arm-in-arm, there is no evidence that Tavares knew that Lynch was present on August 23; rather, director of operations Kozlowski testified that he was the one who allowed Lynch to speak to the employees, and there is no showing that either he or any other supervisor was present at the time of the meeting or knew what was to be discussed. Thus, although I believe that the employees would have perceived Lynch's request as leaving them no choice, I cannot, on this evidence, find SMI guilty of knowingly lending unlawful support, given the *Coamo* premise.

The next allegation refers to the mid-August use of the office by Lynch and Clisas to have the applicants for employment sign the charter for Local 411. Tavares testified that he knew nothing about the charter-signing when he permitted Clisas to use the office; while I imagine that he probably did, I cannot so find on this record. I would therefore also dismiss this allegation.

Finally, there are the postrecognition September 13 meetings. Although the complaint does not closely track the proven facts, it is close enough. It will be recalled that there were three meetings altogether on that day: the first between Paul and four technicians (apparently on working time), the second between Paul, Tavares, and all the full-time employees (apparently not on working time), and the third between Paul and the part-time utility workers (apparently at least in part on working time). September 13 fell after recognition and contract execution; even though I now conclude that these actions were unlawful, I cannot also conclude (however much I suspect) that SMI should have so known on September 13. Accordingly, I cannot find that allowing the recognized Union representative Paul to speak to the employees at these meetings violated Section 8(a)(2).

V. OTHER ALLEGED SMI VIOLATIONS

A. *The Interrogations*

The complaint alleges that Respondent SMI, by Tavares, violated Section 8(a)(1) on September 10 by unlawfully interrogating an employee.

Heelon testified that on September 10, Tavares approached him and "asked me if I knew of anyone who was passing out IBEW or laborers' union cards." Heelon had to inquire as to what the IBEW was, and then answered "no" to the original question. Tavares went on to ask if Heelon "had signed any cards or if I knew who was passing out the cards for the laborers' union." Heelon's reply was again negative. Tavares was not directly asked to deny this testimony; he denied at least part of it, however, by saying that he knew nothing of the IBEW effort until around October 5.

I did not find Tavares (although a likable sort) to be as impressive a witness as Heelon, and I credit the latter. I further conclude that this sudden and unexplained probing into the identity of employees engaged in fostering support for the Laborers and IBEW and into Heelon's own union-related conduct would reasonably have tended to coerce Heelon in the exercise of his Section 7 rights, and therefore violated Section 8(a)(1) of the Act.

I would find no violation, however, in the complaint allegation based on the testimony of Brophy that on September 14, the day after the meeting between Paul, Tavares, and the technicians, Tavares approached Brophy and asked "if everything was okay with the Union." Brophy gave a decidedly negative response. This brief conversation came on the heels of a thorough discussion the day before in which Brophy had disclosed his dissatisfaction with the Union. I find nothing inherently coercive in this mild, not unnatural, followup by Tavares.

B. *The Threat of Discharge*

The complaint alleges that Respondent SMI violated Section 8(a)(1) on September 13 when Tavares told employees that if Paul asked him to discharge an employee "because that employee refused to sign an authorization card for Respondent IATSE," Tavares would do so.

As the testimony showed, however, Tavares did not refer to "an authorization card," but rather to membership applications. I have found above that, as he testified, Tavares did in fact convey to the technicians his understanding that the agreement required the employees to join the Union and that they would be discharged for not doing so.

The law is that union-security agreements may not compel membership in a union, although employees can be required to pay dues and fees to the union. *NLRB. v. General Motors Corp.*, 373 U.S. 734 (1963). The bargaining agreements executed on August 31 recognized that distinction, but Paul and Tavares evidently did not. It is violative of Section 8(a)(1) to inform employees that they must become union members in order to avoid discharge under a union-security agreement. See *Service Employees Local 680 (Stanford University)*, 232 NLRB 326 (1977) (8(b)(1)(A) violation).

C. *The Letter of Reprimand*

The complaint charges that a letter written to Brophy by Tavares on September 29 violated Section 8(a)(1).

Paul McNally, a field representative for the Massachusetts Laborers' District Council,[55] testified that on September 28, he went to the Centrum to investigate a possible grievance relating to the construction laborers (who were then making the final touches on the Centrum and who were represented by the District Council). After entering the site, said McNally, and while looking for the construction laborers' steward, he saw Brophy, "said

[54] The complaint says August 26, but, as discussed, that date is probably wrong.

[55] McNally's testimony makes clear that the Council is a labor organization within the meaning of Sec. 2(5) of the Act, and I so find.

hello to him," but did not speak to him about representation matters, even though McNally, as did Brophy, acknowledged that earlier in the month, Brophy had approached him about organizing the facility for the Laborers. Just at the time he saw Brophy, McNally also saw director of operations Kozlowski, who asked McNally to identify himself and told him to check with Kozlowski before entering the next time.[56]

Brophy testified that he saw McNally on September 28, but merely exchanged greetings with him. Brophy's pretrial affidavit states, however, "We stood in first [sic] the receiving area and spoke for about five minutes"; it also says that McNally spoke to no one else while Brophy was with him, "although a couple of employees spoke to him after I had finished." Brophy admitted having made these statements to the Board agent, but denied their truth, adverting to the pressing circumstances—his grandmother's death—under which he had given the affidavit.

Brophy's testimony seems doubtful. I cannot imagine that Brophy, even under pressure, would have uttered these kinds of erroneous statements.

On September 29, Tavares wrote Brophy a "letter of warning," drafted by Whiteside's office. It alleged that Brophy had "invited an outsider into the Centrum and introduced that person to several employees who were on duty at that time" without management permission, and, further, "escort[ed] your companion around." The letter advised that repetition of such conduct would subject Brophy to disciplinary action, including termination. On September 30, Whiteside sent a letter to McNally accusing him of trespassing and attempting "to interfere with our employees while they were working and with our bargaining obligation with [sic] another Union with which we have contracts."

The foregoing evidence and appropriate inferences would ordinarily lead me to believe that Brophy did escort McNally around and introduce him to other working employees, except that the testimony of Kozlowski gives pause. The latter, who was the one who reported to Tavares on September 28 that "someone from a labor union" was speaking to Brophy,[57] testified surprisingly that he did not see McNally "do anything else other than speaking to Mr. Brophy" and that he had so confined his report to Tavares.

This obviously would suggest that the portion of the letter to Brophy about "escorting" McNally around exaggerated and falsified the facts known to Tavares. Somehow, I am dubious that Tavares simply manufactured this facet of the letter.[58] Given Brophy's affidavit admission that McNally had spoken to a couple of employees after Brophy had finished with him (How would Brophy know that unless he remained there?), I think it may be that Kozlowski simply forgot what he had seen and had told Tavares.

Even so, the matter is obviously suspicious. Tavares did not confront Brophy before writing the letter, instead relying solely on Kozlowski's telephone account. It is quite clear that Respondent was very much on edge about the Laborers' attempt to encroach, and there can be little doubt that Tavares (and even Whiteside) knew that Brophy was aiding the Laborers' effort.

Despite this, I cannot say that the letter violated Brophy's Section 7 rights. I have no firm reason to believe that if Brophy had brought in an insurance salesman or a magazine purveyor and taken him around to meet working employees, Tavares would not also have issued a letter of warning. Accordingly, I cannot conclude that the discipline was so unusual or unwarranted as to give rise to an inference of unlawful motivation.[59]

VI. ALLEGED LOCAL 411 VIOLATIONS

The complaint brands several incidents as constituting violations of Section 8(b)(1)(A) by Local 411. The first as to which any proof was offered[60] is that about September 10 and 13, Local 411, through Don Apholt, "told two employees that they would lose their jobs if they continued to try to organize on behalf of the Laborers."

A member of Local 96, Apholt was hired as a facility technician along with Brophy and the others. Paul testified that he had appointed Apholt as the "call steward" for the stagehands, but not as the steward for the technicians. But he also testified that he "told Apholt" to tell the technicians and utility workers that if they had grievances or problems, to contact Paul in New York, and that he gave Apholt the membership applications which were to be filled out by all the employees. The testimony shows that Apholt thereafter repeatedly urged the employees to complete the forms. He also accompanied Paul to the September 13 utility workers meeting, as shown above.

It does not appear to me that Apholt's agency status is in dispute, at least from the point of view of Local 411. On brief, the latter argues, "Serving in his capacity as designated union steward, Apholt was completely justified in taking this action" with respect to Brophy which is alleged as unlawful. In any event, I think that Apholt was, by September 15, clothed with apparent authority to make statements on behalf of the Union with respect to the consequences of employee activity in support of another union, as described below. *Service Employees Local 300 (Cosmetic Components Corp.)*, 257 NLRB 1335

[56] McNally testified that his access to the building had always been unimpeded theretofore.

[57] When asked what had led him to describe McNally as a "labor union" person, Kozlowski replied, "nothing in particular," but subsequently acknowledged knowing that the Laborers Union was attempting to organize.

[58] Tavares testified that he received a call from either Kozlowski or Breault that there were "union representatives in the building from unions other than IATSE and that they were talking to the men on their work time and interrupting work," and that Brophy had been observed "escorting this individual into the building and introducing him to people."

[59] While it is true that Kozlowski permitted Lynch to speak to employees prior to recognition on August 23, it is one thing for a manager to decide which outsider will be permitted in the facility and another for an employee to do so (thus possibly setting a precedent for other employees).

[60] The complaint alleges coercive conduct by Clisas at an August 25 meeting, but the record contains no evidence about such a meeting. It further attributes certain conduct to Apholt on September 13 which does not appear in the record.

(1981) (union bound by threats made by union interpreter).

Brophy testified that he met outside the Centrum with McNally of the Laborers about September 15. When he entered the building, Apholt approached, asked if Brophy was in contact with another union (and was told that he was), and warned Brophy, "As your union steward, it's my job to advise you that your job is in jeopardy if you continue to do it." Similarly, Heelon testified that after being introduced to McNally by Brophy sometime in September, Apholt had confronted him, asked whether he had been talking to a Laborers' representative, and stated, "You guys, your jobs are in jeopardy if you continue to talk to him."

The statements were plainly coercive, insofar as they reasonably implied that the Union would encourage adverse action against Brophy and Heelon for consorting with a rival labor organization. Respondent Local 411 argues that Apholt, acting appropriately as the "designated union steward," was merely cautioning Brophy to be aware of "SMI's prohibition of outside visitors coming onto the premises absent specific approval"; however, Brophy's and Heelon's testimony was that the meeting took place "outside" the Centrum. Consequently, there was no reason for them to regard such a remark as friendly advice about the specific problem of bringing in outside vistors; the statement, rather, particularly in its formality, very probably would have seemed threatening to the average employee.

Donald Josti was hired on September 1 to perform ice maintenance on a part-time basis. He met Apholt when the latter told him that he "had some papers for me to sign about a union." Josti told him that he already belonged to a union. "The week after that," Apholt, seeming "kind of upset," came to Josti and told him to "stay off [sic] the sidelines and not discuss anything about unions." He also told Josti that Tavares was angry, that heads were going to roll, that management had already decided on the union it was going to have, and "that I was not to discuss any union business because I guess I was affiliated with the AFL-CIO at that time." Apholt did not tell Josti what position he held with the Union, but Josti later heard the part-timers "saying that he had some kind of position as a call steward for IATSE."

I am not persuaded by the foregoing evidence that Josti (whose bargaining unit status is unclear) was sufficiently made aware of Apholt's position so that he would reasonably have imputed statements by the latter to Local 411. He did not, for example, seem to understand what kind of "papers" Apholt wanted him to sign, other than that they had "something to do with a union." I would not find a violation on these facts.

The next allegation relates to the September 13 meeting at which "Apholt and Paul" allegedly told employees that they would be discharged if they "did not sign authorization cards on behalf of Respondent IATSE." Like its 8(a)(1) correlative, this allegation should refer to membership applications, not "authorization cards"; in addition, there is no evidence that Apholt made any such statements. I do find, however, that Paul told the technicians that they would be discharged if they did not complete the membership applications. For the reasons earlier given, such a threat is as unlawful when made by a union as when uttered by an employer. *United Stanford Employees, Local 680*, supra.

VII. THE ALLEGEDLY UNLAWFUL CONTRACT CLAUSES

The complaint asserts that SMI violated Section 8(a)(1), and Local 411 infringed Section 8(b)(1)(A), by agreeing to the following clause in the two August 31 agreements:

> No employee shall engage in any Union activity, including the distribution of literature, which could interfere with the performance of work during his working time or in working areas at any time.

Having determined that the bargaining agreements should be set aside, the following exercise may seem academic, but the issues may be separately violative and are not moot.

The Supreme Court has held that a union may not contractually waive the Section 7 rights of the employees it represents to engage in solicitation and distribution of literature in support of or opposition to the incumbent representative. *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974). There is no showing here that any "special circumstances" exist which would authorize limitation of the general rules of presumption that govern such activity. *Republic Aviation v. NLRB*, 324 U.S. 793, 801-803 fn. 10 (1945).

The instant contract provision is murky in meaning. For one thing, it provides for a variable test of applicability ("could interfere with the performance of work") instead of simply taking advantage of the presumption the law affords to employers to ban union activity altogether on working time. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 617 (1962).[61]

More importantly, the proscriptions are not sufficiently clear or definite for other reasons. It seems to me that, because of the conjunctive "or," the clause can be naturally parsed as (1) prohibiting all forms of union activity (which could interfere with work) during an employee's "working time" and (2) prohibiting such activity "in working areas at any time." I find it impossible to decide what distinction is being drawn between activity barred during "working time" and that which is not allowed "in working areas at any time," and I suspect that a normal employee would have a similar problem. If he understands the "any time" phrase to encompass nonworking time, he might well conclude that solicitation is prohibited even in working areas on nonworking time, although the first part of the clause suggests the contrary. Indeed, on brief Local 411 itself offers as a construction of the clause that it "bans union activity at any time in working areas."

The Board holds that "where the language is ambiguous and may be misinterpreted by the employees in such

[61] In *Our Way*, 268 NLRB 394 (1983), the Board recently held that the phrase "working time," which is used in the clauses here under consideration, implies with adequate clarity the notion that employees may solicit on their own free time.

a way as to cause them to refrain from exercising their statutory rights, then the rule is invalid." *Solo Cup Co.*, 144 NLRB 1481, 1482 (1963). Accord: *NLRB v. Miller-Charles & Co.*, 341 F.2d 870, 874 (2d Cir.) This clause seems to present a case of fatal ambiguity which could lead employees to exercise caution instead of their statutory rights. I conclude that Respondents independently violated the Act, as alleged, by agreeing to this provision.

CONCLUSIONS OF LAW

1. Respondent SMI of Worcester, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Local 411, International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the U.S. and Canada, AFL-CIO; Massachusetts Laborers' District Council; and Local 1228, International Brotherhood of Electrical Workers, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. By extending recognition on August 26, 1982, to Local 411 as the exclusive bargaining representative of its facility technicians and facility utility workers, and by entering into collective-bargaining agreements covering such employees thereafter, at times when Local 411 did not represent an uncoerced majority of the employees, Respondent SMI violated Section 8(a)(2) of the Act; and by accepting such recognition and entering into such agreements, Respondent Local 411 violated Section 8(b)(1)(A) of the Act.

4. By agreeing to contract clauses on August 31, 1982, and September 14, 1982, which unlawfully tended to restrict activity permitted by the Act, Respondents SMI and Local 411 violated, respectively, Section 8(a)(1) and 8(b)(1)(A).

5. By engaging in coercive interrogation of an employee about September 10, 1982, and by threatening to discharge employees for refusing to execute union membership applications on September 13, 1982, Respondent SMI violated Section 8(a)(1) of the Act.

6. By warning two employees in September 1982 that they would be disciplined for engaging in lawful activity on behalf of another union, and by threatening the discharge of employees for refusing to execute union membership applications on September 13, 1982, Respondent Local 411 violated Section 8(b)(1)(A) of the Act.

7. Except as found above, Respondents have not otherwise violated the Act as alleged in the complaint.

THE REMEDY

An appropriate remedial order is, of course, required by the foregoing findings of fact and conclusions of law.

The traditional remedy in cases such as this is to require rescission of the bargaining relationships. As the Supreme Court pointed out in the *Ladies Garment Workers* case, supra, at 739, "This conclusion, while giving the employee only the protection assured him by the Act, places no particular hardship on the employer or the Union. It merely requires that recognition be withheld until the Board-conducted election results in majority selection of a representative." Any contention based on the value of industrial stability should properly yield in a case such as this to the value of the "complete and unhampered freedom of choice which the Act contemplates," *Machinists Local 35 v. NLRB*, 311 U.S. 72, 80 (1940). Any contention based on the investment by the Employer and the Union in negotiating their agreements is beside the point in this particular case, in view of the fact that the bulk of the time, energy, and material resources expended in negotiating occurred at a point, the parties concede, when they were (in theory, at any rate) uncertain as to whether the Union would be the majority representative. The remedy is simple, harmful to no one, and particularly desirable in a case such as this, in which, to borrow the pungent language of former Chairman Miller in *Longchamps*, supra, 205 NLRB at 1027, "the odor of unlawful assistance and support is too strong for at least my nostrils to tolerate."

In addition to requiring the parties to cease and desist from continuing their bargaining relationships, other restraints are appropriate, and so is the posting of traditional notices.

[Recommended Order omitted from publication.]